Supreme Court of the United States

OCTOBER TERM, 1969

No. 269

EARL PRICE,

Petitioner,

vs.

GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

INDEX

	Page
Notice of intention to apply to the Supreme Court of the United States filed in the Court of Appeals of the State of Georgia	1
Record from the Superior Court of Effingham County Georgia	4
Notice of appeal	4
Plea of autrefois acquit	5
Attachment—Indictment of October Term, 1962 with verdict of the jury, dated October 17, 1962 and defendant's plea of not guilty	8
Order overruling plea of autrefois acquit	11
Plea of not guilty, October 19, 1967	11
Verdict of October 20, 1967	11
Sentence	12

Page

Record from the Superior Court of Effingham County Georgia—Continued

Transcript of testimony, October 19, 1967 (excerpts) — 13

Motion by defendant — 13

Testimony of Mr. A. Parker Ford — 16

Defendant's Exhibit 1—Indictment of October Term, 1962 with verdict of jury, dated October 17, 1962 and defendant's plea of not guilty — 28

Charge of the court (excerpt) — 31

Enumeration of Errors filed in the Supreme Court of Georgia — 32

Proceedings in the Court of Appeals of the State of Georgia — 35

Opinion, Jordan, J., June 25, 1968 — 35

Opinion on motion for rehearing, July 24, 1968 — 37

Judgment — 39

Motion for rehearing — 40

Order denying motion for rehearing — 50

Notice of intention to apply for writ of certiorari to the Supreme Court of Georgia — 51

Order of Supreme Court of Georgia denying certiorari — 53

Order staying remittitur — 54

Clerk's certificate (omitted in printing) — 54

Application for certiorari to the Supreme Court of Georgia — 55

Certificate of counsel — 60

Judgment of Supreme Court of Georgia — 61

Clerk's certificate (omitted in printing) — 61

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari — 62

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

Case Number 43,747

EARL PRICE, PLAINTIFF IN CERTIORARI

vs.

STATE OF GEORGIA, DEFENDANT IN CERTIORARI

NOTICE OF INTENTION TO APPLY TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI—
Filed September 30, 1968

TO THE CLERK OF THE COURT OF APPEALS OF GEORGIA.

You are hereby notified that it is the intention of EARL PRICE, Plaintiff in Certiorari to apply to The Supreme Court of the United States for a Writ of Certiorari to review the Judgment and action of The Court of Appeals in refusing to set aside the Judgment of the Trial Court, rendered and filed in the above stated case on June 25th, 1968, in which case a motion for rehearing was denied on July 24th, 1968, a Writ of Certiorari being filed in The Supreme Court of Georgia on August 22nd, 1968, the same being denied on September 24th, 1968, case no. 24,879. The following portions of the record are hereby ordered:—

1- Notice of Appeal filed in Effingham County, Georgia, Superior Court. (Page 1 of the record as prepared by Clerk of Trial Court.)

2- Special Plea of Autrefois Acquit. (Pages 2 thru 6 of record as prepared by Clerk of Trail Court.) Which includes the Grand Jury Indictment of Earl Price for murder at the 1962, Term of Effingham County, Georgia, Superior Court which is pages 5 and 6 of the record as prepared by the Clerk of the Trial Court.

3- Bill of Indictment for murder from Effingham County, Georgia, Superior Court, 1962, Term and all

notations thereon. (Pages 5 and 6 of the record as prepared by the Clerk of the Trial Court.)

4- Order of Trial Court dated October 19th, 1967, overruling the Special Plea of Autrefois Acquit. (Page 7 of the record as prepared by the Clerk of the Trial Court.)

5- Verdict of Jury dated October 17th, 1962, finding Plaintiff in Certiorari guilty of Voluntary Manslaughter fixing his punishment at 10 years minimum and 15 years maximum. (Page 6 of the record as prepared by the Clerk of the Trial Court.)

6- Plea of Not Guilty, dated October 19th, 1967, entered by Plaintiff in Certiorari. (Page 8 of the record as prepared by the Clerk of the Trial Court.)

7- Verdict of Jury dated October 20th, 1967, finding Plaintiff in Certiorari guilty of voluntary manslaughter fixing his punishment at 10 years. (Page 9 of the record as prepared by the Clerk of the Trial Court.)

8- Sentence of Effingham County, Georgia, Superior Court at the October, 1967, Term. (Page 10 of the record as prepared by the Clerk of the Trial Court.)

9- Motion of Plaintiff in Certiorari made in Effingham County, Georgia, Superior Court. (Pages 3 thru 7 of the transcript of the trial proceedings.)

10- Evidence of Honorable A. Parker Ford, Clerk of Effingham County, Georgia, Superior Court. (Pages 8 thru 25 of the transcript of the Trial proceedings.)

11- Indictment of the Grand Jury of Effingham County, Georgia, Superior Court at the October, 1962, Term of the Court charging Plaintiff in Certiorari with the offense of murder and marked "Defendant's Exhibit No. 1." (Page 29 of the transcript of the trial proceedings.)

12- A portion of the charge of the Honorable Walton Usher, Judge of Effingham County, Georgia, Superior Court, on murder to the Trial Jury. (Page 223 of the Transcript of the Trial proceedings.)

13- Enumeration of Errors as filed in the case.

14- Opinion of the Court of Appeals of Georgia dated June 25th, 1968, case number 43,747.

15- Motion for Rehearing filed in The Court of Appeals of Georgia on July 2nd, 1968.

16- Opinion of The Court of Appeals of Georgia on the Motion for Rehearing dated July 24th, 1968, case number 43,747.

17- Written notice to the Honorable Morgan Thomas, Clerk of The Court of Appeals of Georgia of intention to apply to The Supreme Court of Georgia for a Writ of Certiorari filed July 29th, 1968.

18- Application for Certiorari filed in The Supreme Court of Georgia, August 22nd, 1968.

19- Order of The Supreme Court of Georgia denying the Writ of Certiorari dated September 24th, 1968, case number 24,879.

20- Written notice to the Honorable Morgan Thomas, Clerk of The Court of Appeals of Georgia of intention to apply to The Supreme Court of The United States for Writ of Certiorari. (The within notice.)

Plaintiff in Certiorari is without relief other than an application for a Writ of Certiorari to The Supreme Court of The United States, all of his state remedies having been exhausted.

Plaintiff in Certiorari is entitled to a stay of the execution of his sentence, a supersedeas and a request of stay of the issuance of a remittitur of record is requested so that he may prosecute his appeal to The Supreme Court of The United States without the necessity of being incarcerated pending the appeal, all applications for a stay of the issuance of a remittitur or a supersedeas must be made to the Court whose decision is sought to be reviewed, which in this case is The Court of Appeals of Georgia.

WHEREFORE, Plaintiff in Certiorari prays that this his notice of intention to apply to The Supreme Court of The United States be filed; that the parts of the record be prepared for The Supreme Court of The United States as herein ordered and that his request for a stay of the issuance of a remittitur of record be granted.

/s/ Allyn M. Wallace
Attorney for Plaintiff
in Certiorari.

ALLYN M. WALLACE
P. O. BOX 43
SAVANNAH, GEORGIA

[Certificate of Service Omitted in Printing]

[File Endorsement (Omitted in Printing)]

IN THE SUPERIOR COURT
OF EFFINGHAM COUNTY, GEORGIA

Case Number 684

THE STATE OF GEORGIA

vs.

EARL PRICE

NOTICE OF APPEAL—Filed November 4, 1967

Notice is hereby given that EARL PRICE, defendant above named, hereby appeals to the Supreme Court of Georgia from the ruling and order entered on defendant's special plea of Autrefois Acquit entered herein October 19th, 1967 and from the judgment of conviction and sentence entered October 20th, 1967.

The offense for which defendant was convicted is voluntary manslaughter, and the sentence imposed is ten (10) years in the Penitentiary.

The Clerk will please prepare, certify and transmit to the Clerk of the Supreme Court of Georgia, the entire record in this case.

Dated at Springfield, Effingham County, Georgia, this 4th day of November 1967.

/s/ Allyn M. Wallace
Attorney for Appellant.

[Certificate of Service Omitted in Printing]

[File Endorsement Omitted in Printing]

IN THE SUPERIOR COURT OF EFFINGHAM COUNTY, GEORGIA

MURDER

STATE OF GEORGIA

—*vs.*—

EARL PRICE

PLEA OF AUTREFOIS ACQUIT—April 17, 1967

TO THE SUPERIOR COURT OF EFFINGHAM COUNTY, GEORGIA

NOW COMES THE DEFENDANT, EARL PRICE, in the above named and styled case, and, before plea and arraignment therein, files this, his special plea thereto and alleges:

1. That on the 17th day of October, 1962, in the Superior Court of Effingham County, Georgia, this Defendant was placed on trial before a jury in that court, upon an indictment for the offense of murder.

2. That after having filed a plea of not guilty to said charge, after issue in the said case was made up and submitted to the jury, and after evidence had been heard thereon in the Superior Court of Effingham County, Georgia, before the Honorable Walton Usher, the jury returned a verdict of guilty of voluntary manslaughter, the jury fixing a minimum sentence of 10 years and a maximum sentence of 15 years.

3. The defendant appealed the conviction of voluntary manslaughter to the Court of Appeals of Georgia, the same being Case No. 40,272 decided by the Court October 31, 1963, wherein the Court reversed the conviction of voluntary manslaughter upon the ground that the lower court erred in charging mutual combat as set out in Code Section 26-1014 of the Annotated Code of Georgia, the Court of Appeals of Georgia having taken the position that there was no evidence during the trial of the case of mutual combat.

4. The Defendant further shows to the Court that the indictment for murder was founded upon the same facts and the same transaction and in fact is the same indictment upon which the present case is now before the Court for trial, the Defendant, EARL PRICE, being the same person named in the indictment for murder, and this Defendant charges and alleges that having been tried and convicted of the offense of voluntary manslaughter, he was by that act of the jury acquitted of the offence of murder in the trial held in this honorable court on the 17th day of October, 1962.

5. Petitioner further says that since he was tried in this Honorable Court on the 17th day of October, 1962, under the same indictment that he is now being tried for the offensive murder and the jury, during the trial of the case on the 17th day of October, 1962, having found him guilty of voluntary manslaughter, he would be put in jeopardy of his life and liberty more than once for the same offense and that it would be a violation of his constitutional rights as guaranteed under the Constitution of the United States as well as the Constitution of the State of Georgia as set out in Code Section I-805 and 2-108 of the Annotated Code of Georgia which reads as follows:

> "I-805 (6688) INDICTMENT, PUNISHMENT, ETC. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."
>
> "2-108 (6364) Paragraph VIII. JEOPARDY OF LIFE OR LIBERTY MORE THAN ONCE FORBIDDEN.—No person shall be put in jeopardy of

life, or liberty, more than once for the same offense, save on his, or her own motion for a new trial after conviction, or in case of mistrial."

6. Petitioner attaches hereto with this special plea a copy of said indictment for murder in the Superior Court of Effingham County, Georgia, with the verdict of the jury thereon, as well as Defendant's plea of not guilty, the same being a part of this plea.

WHEREFORE, the Defendant having filed this special plea of *Autrefois* Acquit prays that this, his plea, be examined by this Honorable Court and that the indictment for murder be quashed and the Defendant dismissed.

/s/ Allyn M. Wallace
Attorney for Defendant

[*Duly sworn to by Earl Price jurat omitted in printing (all in italics)*]

ATTACHMENT TO PLEA OF ANTREFOIS ACQUIT

IN THE SUPERIOR COURT OF
EFFINGHAM COUNTY, STATE OF GEORGIA

INDICTMENT—Murder

The Grand Jurors, selected, chosen and sworn for the County of Effingham to-wit

1 Robert E. Graham Foreman

2 Calvin L. Seckinger
3 J. W. Exley, Sr.
4 Rupert L. Seckinger
5 Arnett A. Graham
6 J. F. Edwards, Jr.
7 Charlie Toshack
8 James Zittrouer
9 Lou Dean Hinely, Sr.
10 John Henry Zipperer
11 N. M. Arnsdorff
12 H. H. Reiser
13 Howard E. Wilson
14 Russell Pittman
15 Woodrow W. Oglesby
16 Waring D. Exley
17 C. M. Weaver
18 L. L. Durrance
19 Alton W. Exley
20 Burley L. Conaway
21 Perry M. Seckinger
22 C. A. Jerald
23 _____

In the name and behalf of the citizens of Georgia, charge and accuse Earl Price of the County and State aforesaid with the offense of.

MURDER

for that the said Earl Price on 18th day of August, in the year of our Lord Nineteen Hundred and Sixty-Two, in the County and State aforesaid, did then and there, unlawfully, and with force and arms, make an assault in and upon one Johnnie Mae Dupree in the peace of God and said State then and there being, then and there unlawfully, feloniously, wilfully and of his malice aforethought, did kill and murder by cutting and stabbing the said Johnnie Mae Dupree with a certain knife which the said Earl Price then and there held, and giving to the said Johnnie Mae Dupree then and there a mortal wound, of which mortal wound the said Johnnie Mae Dupree died.

And so the Jurors aforesaid, upon their oath aforesaid, do say that the said Earl Price the said Johnnie Mae Dupree in manner and form aforesaid, unlawfully, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the laws of said State, the good order, peace and dignity thereof.

Effingham Superior Court
October Term, 1962

H. B. LINDSEY
Prosecutor
Special Presentment

COHEN ANDERSON
Solicitor-General

No. 684

EFFINGHAM SUPERIOR COURT
OCTOBER TERM, 1962

THE STATE

vs.

EARL PRICE

MURDER

TRUE BILL

R. E. GRAHAM, Foreman
H. B. LINDSEY, Prosecutor

COHEN ANDERSON
Solicitor-General

WITNESSES FOR THE STATE

Pauline Wilkerson
Guessman Johnson
Ethel Lee Johnson
Wiley Bailey
Betty Ann Dupree
Dr. Sowell
H. B. Lindsey
Frank Rahn

The Defendant, _____

waives copy of Indictment and list of witnesses; also waives being formally arraigned and pleads not guilty.

COHEN ANDERSON
Solicitor-General

ALLYN M. WALLACE
Defendant's Attorney.

Oct. 17, 1962

We the Jury find the defendant Earl Price guilty, of Voluntary Manslaughter and fix the penalty at a minimum of ten (10) years and a maximum of fifteen (15) years.

This 17th day of October, 1962.

SAM F. JONES, Foreman

IN THE SUPERIOR COURT OF EFFINGHAM COUNTY, STATE OF GEORGIA

STATE OF GEORGIA

vs.

EARL PRICE

ORDER OVERRULING PLEA OF AUTREFOIS ACQUIT—
October 19, 1967

The within AUTREFOIS ACQUIT having been filed in the Court and after hearing evidence and argument of Attorneys for the State of Georgia and the Defendant, EARL PRICE, the same is overuled, this 19th day of October, 1967.

WALTON USHER
Judge Effingham
Superior Court

The defendant being formally arrained, pleads not guilty, 10/19/67.

ALLYN M. WALLACE
Defendants Atty.

We, the Jury find the Defendant guilty of Voluntary Manslaughter and fix his punishment at ten (10) years.

October 20, 1967

Foreman
T. W. BRAGG, JR.

IN THE SUPERIOR COURT
OF EFFINGHAM COUNTY, GEORGIA

FELONY OR STATE MISDEMEANOR SENTENCE

Case No. 684

Charge Murder

October Term, 1967

THE STATE

vs.

EARL PRICE

JURY VERDICT: GULITY OF VOLUNTARY MANSLAUGHTER—
October 20, 1967

WHEREUPON it is ordered and adjudged by the Court that the Defendant EARL PRICE be taken from the Bar of the Court to the jail of EFFINGHAM County, and be there safely kept until a sufficient guard is sent for him from the State Penal System and be then delivered to, and be by said guard taken to such penal institution in said system as the Director of Corrections may direct, where he, the said defendant, shall be confined at labor for a term of TEN (10) YEARS to be computed according to law.

Other special conditions ordered by the Court are as follows:

The defendant, EARL PRICE, was represented in this matter by the Honorable ALLYN M. WALLACE, Attorney at Law, CHATHAM, County.

By the Court
October 20th 1967

/s/ Walton Usher
Judge Superior Court Presiding Effingham County, Georgia

Solicitor General

[fol. 3] IN THE SUPERIOR COURT
OF EFFINGHAM COUNTY, GEORGIA

STENOGRAPHER'S NOTE: When the solicitor general called the case of The State of Georgia vs. Earl Price, charged with murder, the following transpired:

TRANSCRIPT OF TESTIMONY—October 19, 1967

MR. ANDERSON: The State's ready.

MR. WALLACE: I have a motion to make outside the presence of the jury.

* * * *

MOTION BY DEFENDANT

MR. WALLACE: Now, if Your Honor pleases, to perfect the record, I would like to state that this morning, on October 19th, 1967, the Honorable Cohen Anderson, Solicitor General of the Ogeechee Judicial Circuit, in Effingham County Superior Court, called the case of [fol. 4] The State of Georgia vs. Earl Price. On that arraignment I made the statement to the Court that before we were called upon to plead, I would like to have a motion that has been filed with this Court previously to this time, in the nature of an autrefois acquit heard by the Court and passed upon and decided by the Court before we entered into the actual trial of the case. I would also like for the record to show that this is being done and heard by this Honorable Court prior to the striking of the jury, and almost immediately after the announcement of the case by the Solicitor General of this Circuit.

I would like also to state in the record that at the October (give me just a second) that the motion and plea in the nature of the autrefois acquit was filed in this Court on the 17th day of April, 1967, and my position is in this matter that at the October 1962 term of the grand jury of Effingham County, under indictment number 684, rendered a true bill charging the defendant with murder of one Johnnie Mae Dupree. That case

came on for trial in October of 1962, he was present, he was arraigned and he plead not guilty. He was tried before a jury in Effingham County, the Superior Court, the jury saw fit not to find him guilty of murder but of a lesser offense Manslaughter, and if I may read into the record my petition addressed to this Honorable Court. Now comes the defendant, Earl Price, in the above—

THE COURT: Mr. Wallace, that was voluntary manslaughter, wasn't it. Did you say Voluntary Manslaughter?

[fol. 5] MR. WALLACE: I didn't say which, I just said manslaughter. If Your Honor please, it was Voluntary Manslaughter. Let the record show that he was found guilty of Voluntary Manslaughter on October 17th, 1962, by a jury verdict. Now comes the defendant, Earl Price, if I may read the petition, it's very short. Now comes the defendant, Earl Price, in the above and styled case and before plea and arraignment therein, files this, his special plea thereto and alleges:

1. That on the 17th day of October, 1962, in the Superior Court of Effingham County, Georgia, this defendant was placed on trial before a jury in that court, upon an indictment for the offense of murder.

STENOGRAPHER: Did you say the 7th or 17th?

MR. WALLACE: 17th.

2. Two of the petition, paragraph 2. That after having filed a plea of not guilty to said charge, after issue in the said case had been made up and submitted to the jury, and after evidence had been heard thereon in the Superior Court of Effingham County, Georgia, before the Honorable Walton Usher, the jury returned a verdict of guilty of voluntary manslaughter, the jury fixing a minimum sentence of 10 years and maximum sentence of 15 years.

3. The defendant appealed the conviction of voluntary manslaughter to the Court of Appeals of Georgia, the same being Case No. 40,272 decided by the Court October 31, 1963, wherein the Court reversed the conviction of [fol. 6] voluntary manslaughter upon the ground that the lower court erred in charging mutual combat as set out in Code Section 26-1014 of the Annotated Code of Geor-

gia, the Court of Appeals of Georgia having taken the position that there was no evidence during the trial of the case of mutual combat.

4. The defendant further shows to the Court that the indictment for murder was founded upon the same facts and the same transaction and in fact is the same indictment upon which the present case is now before the Court for trial, the defendant, Earl Price, being the same person named in the indictment for murder, and this defendant charges and alleges that having been tried and convicted of the offense of voluntary manslaughter, he was by that act of the jury acquited of the offense of murder in the trial held in this honorable Court on the 17th day of October, 1962.

5. Petitioner further says that since he was tried in this Honorable Court on the 17th day of October, 1962, under the same indictment that he is now being tried for the offense of murder and the jury, during the trial of the case on the 17th day of October, 1962, having found him guilty of voluntary manslaughter, he would be put in jeopardy of his life and liberty more than once for the same offense and that it would be a violation of his constitutional rights as guaranteed under the Constitution of the United States as well as the Constitution [fol. 7] of the State of Georgia as set out in Code Section 1-805 and 2-108 of the Annotated Code of Georgia which reads as follows: As to the Federal Constitution item 1-805 Indictment, Punishment, ect. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6. Petitioner attaches hereto with this special plea a copy of said indictment for murder in the Superior Court

of Effingham County, Georgia, with the verdict of the jury thereon, as well as defendant's plea of not guilty, the same being a part of this plea.

Wherefore, the defendant having filed this special plea of autrefois acquit prays that this, his plea, be examined by this Honorable Court and that the indictment for murder be quashed and the defendant dismissed. And that plea, if the Court pleases, and may the record show, was verified by the defendant, Earl Price.

Now, if I may, if the Court pleases, I'd like to put Mr. Ford on the witness stand to make some identifications and perfect the record. Will you take the stand, [fol. 8] please, sir. Will you take the stand, please, sir.

A. PARKER FORD, after first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALLACE

Q You are Mr. A. Parker Ford?

A Yes.

Q Where do you live, Mr. Ford?

A Springfield, Georgia.

Q What is your connection with Effingham County, Superior Court?

A Clerk of the Superior Court.

Q You were in the courtroom this morning, were you not, when the Honorable Cohen Anderson called the case of The State of Georgia vs Earl Price?

A Yes, I was.

Q Did you or did you not hear him say that he was to be tried for murder?

THE COURT: Mr. Wallace, I think the Court would say that the solicitor general did make an announcement in open court that he charged the man with murder and that he would be tried on the original indictment for murder. Would that complete the record for you?

[fol. 9] MR. WALLACE: Yes, sir.

THE COURT: That's the way the Court heard it, at least, the Clerk may not have heard it.

Q Mr. Ford, I hand you a document, which is a presentment made by the Effingham County grand jury at

the October, 1962, term of this Court, charging Earl Price, who was present in court, with the murder of Johnnie Mae Dupree on the 8th of August, on the 18th day of August, 1962. Will you look at that indictment, please, sir, and tell me if that is an official document in your court and in your custody (witness examining document)?

A Yes, it is.

Q And does that indictment, is that an indictment of the Effingham County grand jury, at the October 1962 term?

A Yes.

Q Does that indictment charge Earl Price with murder in that he murdered Johnnie Mae Dupree, one Johnnie Mae Dupree?

A Yes.

Q Would you tell us, please, sir, the number of that indictment?

A No. 684.

Q Does that, is that the indictment which Earl Price [fol. 10] was tried in Effingham county superior court in October of 1962?

A Yes.

Q Do you have any other indictment in your possession or in your custody or in the court, so far as you know, charging Earl Price with murder other than this one document or indictment?

A That's the only one I have.

Q Is that indictment now in this Court and before this Court, is that the indictment which is now in this Court and before this Court on which Earl Price is being tried for murder?

A Yes, to the best of my knowledge.

Q Is the jury verdict on that indictment, let me ask you this, strike that, was Earl Price tried in Effingham County superior court on October 17th, 1962?

A Correct.

Q Were you present at that trial?

A Yes.

Q Were you the Clerk of this Court at that trial?

A Yes.

[fol. 11] Q You yet have the indictment in your hand, is the jury verdict reflected on that indictment (witness examining document)?

A Pardon?

Q Is the jury verdict reflected or on that indictment?

MR. ANDERSON: Your Honor, we have that concealed at this time, getting ready for this trial. We can stipulate that the verdict does appear.

MR. WALLACE: Well, I have a copy of it here if you'll permit me, if you'll agree to let him read that?

MR. ANDERSON: That's all right.

Q Does that indictment have on it the jury verdict of its 1962 October trial (witness examining document)?

A Yes.

Q Would you read it please, sir, for the record, in its entirety?

A We the jury find the defendant Earl Price guilty of voluntary manslaughter and fix his penalty at a minimum of 10 years and a maximum of 15 years. This 17th day of October, 1962. Signed Sam F. Jones, Foreman.

Q And that is a true and correct verdict that was rendered by the jury at that time?

A Yes.

MR. WALLACE: Now, if Your Honor pleases, I'd [fol. 12] like to introduce in evidence the indictment itself and ask Mr. Ford to verify the copy that I have attached to the pleadings to determine whether or not it reflects a true and correct copy and if it does, we can substitute it in place of the original indictment.

THE COURT: It would be in the record any way.

MR. WALLACE: Yes, sir, well, it's a part of it.

Q Would you glance at it, Mr. Ford, and tell me whether or not, in your opinion, that is a true copy of the indictment that you have in your possession charging Earl Price with murder as returned by the October 1962 grand jury of Effingham County Superior Court (witness examining document)?

A It looks like this statement here has been left off (indicating).

Q Well, if that's inserted, with the permission of the Court, would that be a true copy of the indictment as you have here in this Court (referring to document)?

A On the face of it, it looks like it is, yes. I couldn't tell you without seeing what's covered up.

STENOGRAPHER: I didn't get the last of it, I couldn't tell you what?

THE COURT: Mr. Wallace, did you make a copy of that?

MR. WALLACE: Yes, sir.

THE COURT: Do you state in your place that it is [fol. 13] a copy of it?

MR. WALLACE: I'll state in my place that it is a true and correct copy except, I believe they added Dr. Sowell, H. B. Lindsey, Frank Rahn, waive copy of indictment and list of witnesses.

A I've just added that.

MR. ANDERSON: I've just added that list of witness.

MR. WALLACE: Oh, you just added that, that has just been recently added, that's why it wasn't on there.

THE COURT: Well, if you state it's a copy, we'll let it go in evidence.

MR. WALLACE: Yes, sir, I'll stand in my place and say that it is a correct copy of the indictment.

THE COURT: All right.

STENOGRAPHER: Well, now, you want it to go in instead of the original?

THE COURT: It's in the pleadings.

STENOGRAPHER: I know, but he said he wanted to introduce it in evidence.

MR. WALLACE: I do want to introduce it in evidence, yes.

THE COURT: But he wants to put a copy in the place of the original in the evidence.

STENOGRAPHER'S NOTE: Document identified as Defendant's Exhibit No. 1, offered and admitted in evidence, hereto attached and made a part of this transcript.

[fol. 14] Q Let me ask you this, Mr. Ford, I overlooked this—

THE COURT: Mr. Wallace won't it be simplier, the original indictment will be in the files of the Clerk when

the case is tried, wouldn't it be simplier just to say we'll let the Court Reporter substitute a copy of the original indictment?

MR. WALLACE: Yes, sir, that was my purpose in introducing it.

THE COURT: She can make a photostatic copy of it.

MR. WALLACE: Yes, sir, that's all right.

STENOGRAPHER: But I still need to mark it.

THE COURT: She needs to mark it. You'll probably then have to put what's been wrote in or on it.

MR. WALLACE: Yes, sir, we'll put it on it. Just add two names and what he said he put on it.

THE COURT: All right.

Q Now, Mr. Ford, your records in the Clerk's office of Effingham Superior Court, show that this case was appealed to the Court of Appeals of the State of Georgia in Atlanta?

A Yes.

Q Will your records show the case number of the Court of Appeals in this case?

A Yes. But that's the remittitur and I don't find a number on it.

[fol. 15] STENOGRAPHER: I can't hear you, Parker.

A I say I don't find a number on the remittitur.

MR. WALLACE: May I state in my place, and it will be verified later, that the case number in the Court of Appeals is 40,272? That can be verified by the record.

THE COURT: His records wouldn't show the Court of Appeals number, except on the remittitur I reckon when it came down.

A Judge, we don't find it on the remittitur.

THE COURT: Do you have the remittitur?

A Yes, sir.

THE COURT: Well that would show the number.

STENOGRAPHER: It's not on there.

A It's not on there. I looked and it's not on there.

THE COURT: (Examining document) I see.

Q Mr. Ford, then that case was appealled, the Earl Price case, that was tried in October, 1962, to the Court of Appeals in Atlanta, is that correct?

A Yes.

Q And do you know whether or not that conviction was reversed?

A Yes.

Q The conviction of Earl Price in Effingham Superior Court, October 1962 term?

[fol. 16] A Yes.

Q It was appealled, was it not?

A Yes.

Q And was it reversed by the Court of Appeals?

A Yes.

Q And is that now the same case that's before the Court now for trial?

A Yes.

Q Now, I hand you a document, will you please, sir, tell us what that is and the date of it and read the decision of the Court (witness examining and reading from document)? Tell us what it is?

A This is the remittitur from the Court of Appeals of the State of Georgia, dated, Atlanta, Georgia, October 31, 1963. And the following judgment was rendered: The State vs Earl Price. This case before this court on a writ of error from the Superior Court of Effingham County, and the argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in overruling the motion for a new trial. Nichols, Frankum and Jordan concur.

[fol. 17] Q And that is an official document in your possession and in your, in the Clerk's office of Effingham Superior Court of which you are the Clerk?

A Yes.

MR. WALLACE: I'd like to present this in evidence, if Your Honor please.

THE COURT: Was there ever a judgment taken in, by the Court after that remittitur came down?

MR. WALLACE: I believe the remittitur is supposed to be signed by Your Honor, that's my understanding. I don't believe you ever signed it, sir.

THE COURT: I don't sign the remittitur but there's supposed to be a judgment taken on the remittitur. I don't know whether one has ever been taken or not.

MR. WALLACE: I don't recall having drawn one. I would like to put that in evidence.

THE COURT: All right, sir.

STENOGRAPHER'S NOTE: Document identified, offered and admitted in evidence as Defendant's Exhibit No. 2. Copy hereto attached and made a part of this transcript.

Q Now, Mr. Ford, to the best of your knowledge and belief, is the Earl Price that's now before this Court to be tried for murder one, and the same person who was here in October 1962 and tried for the offense of Murder on the same offense that is outlined on the indictment that is now in your possession?

[fol. 18] A I have your word that's Earl Price but I don't recall what he looked like when he was in Court in 1962.

Q But there's been no other name added or taken from that indictment against Earl Price?

A That's right. No.

MR. WALLACE: Now, Your Honor, that seems to complete the record and I would like to respectfully call to Your Honor's attention two cases, one in particular from the United States Supreme Court as published in Lawyers' Addition 2nd, U.S. 355 I believe it is, 355, it's the case of Everett D. Greene petitioner, vs United States of America. It was a case that was tried in the District of Columbia in the lower court. The defendant was charged with murder, he was tried and convicted of a lesser offense, I believe they call it second degree murder. The Court, on appeal, when the case came back, he appealed for a new trial and the new trial was granted, he was tried and again convicted for manslaughter, second degree murder as they called it, the case went to the United States Supreme Court and it was decided December 16th, 1957, the case itself is rather long, but if Your Honor pleases, I would like to read the excerpts and the head notes, a few of them in the interest of time, to get my point over to the Court. Item No. 1. The provisions of the 5th Amendment against double jeopardy is de-

[fol. 19] signed to protect and individual, an individual where, from being subjected—

THE COURT: —wait just a minute, Allyn, what was it you wanted, Mr. Fetzer?

MR. FETZER: I just wanted to know where he was reading from.

MR. WALLACE: May I start over again. No. 1, headnote number 1. The provisions of the 5th Amendment against double jeopardy is designed to protect an individual from being subjected to the hazzards of trial and possible conviction more than once for an alleged offense. The underlying idea is that the State, with all its resources and powers, should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeals, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility of even though innocent he may be found guilty. Headnote Number 2. Under the 5th Amendment probation against double jeopardy, a verdict of acquittal even when not followed by a judgment is a bar to a subsequent prosecution for the same offense. Then, I'll skip this, if Your Honor pleases, to headnote No. 9. For purposes of the rule against former jeopardy, a case in which a jury returns instructions on both first and second degree murder, returns a verdict of guilty for second degree murder, cannot be treated differently from [fol. 20] a situation in which the jury specifically finds that the defendant is not guilty of murder in the first degree but guilty of murder in the second degree. Headnote No. 10. A defendant, who, on a charge of first degree murder, was convicted of second degree murder, does not waive his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a successful appeal of his improper conviction of second degree murder. That is the Price case, sir. Then I skip to Headnote No. 16. Where a defendant is charged with two offenses, neither of which is a lesser offense included within the other, and has been found guilty of one, but not on the second, he cannot be tried again on the second, even though he secures reversal of the conviction, and even though the two offenses are related offenses charged in the same indictment. Now, so much for the headnotes. Now, I do have a small portion of the wording of the Court that I would like to call to Your Honor's attention, which is not too long.

STENOGRAPHER: What page is that?

MR. WALLACE: It's page 205 in the same case, Greene vs United States. In this case, however, we have a much different question, much different question. At Greene's first trial, the jury was authorized to find him guilty of either, for either first degree murder, (killing one, killing while perpetrating a felony) or alternatively a second degree murder, killing with malice or afore-[fol. 21] thought. The jury found him guilty of second degree murder but on his appeal that conviction was reversed and the case remanded for a new trial. At this new trial Greene was tried again, not for second degree murder but for first degree murder. Even though the original jury had previously found him guilty, had refused to find him guilty on that charge, and it was in no way involved in his appeal. For the reasons stated hereafter, we conclude that the second trial for first degree murder placed Greene in double jeopardy for the same offense in violation of the constitution. Greene was put in direct peril of being convicted and punished for first degree murder at the first trial. He was forced to run the garpent once on that charge and the jury refused to convict him. When given the choice of doing, of finding him guilty of either first degree or second degree murder, he, they chose the latter, it chose the latter. In this situation a great majority of the cases in this country have regarded jurys' verdict an an emplicit acquittal on a charge of first degree murder but the result in this case need not rest alone on the assumption which we believe legitimate, that the jury for want, for one reason or another, acquitted Greene of murder in the first degree, for here the jury was dismissed without retaining any express verdict on that charge and without Greene's consent, yet it was given a full opportunity to return a verdict and no extra ordinary circumstances appeared which it pre-[fol. 22] vented it from doing so, which prevented. Therefore, it seems clear under a status of former jeopardy, that Greene's jeopardy was first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. Now, I don't think there is any need to read any further, and I would like to call Your

Honor's attention to a more recent case, which is right on the point, and I will not take the Court's time to read those headnotes, and that is the case of United States of America vs Walter Hitch Wilkins, Warden, State Prison. This came out of the 2nd Circuit Court of Appeals. It's a New York case and I have these notes market, and I may read one of them in this case. This case was decided July 13th, 1965 in the Federal Court, having been tried in the State court in New York, and was carried to the Circuit Court. This is Headnote 15 in this case. In view of the fact that the State was constitutionally forbidden to prosecute a case for first degree murder barring completion of the first trial at which he had been convicted of second degree murder and there was a reasonable possibility that the conduct of the third trial in deliberation of the jury were affected by the fact that the third trial had been for first degree murder of the accused who was convicted of second degree murder at a third trial, was being held in custody in violation of due process of laws. Now, to bring it to an end, if Your Honor pleases, it's our position that under these decisions it would be a violation of this man's rights to [fol. 23] again try him, under the Federal Statute and this comes, this all comes in, and these cases tell you that the 4th and 5th amendment of the Constitution of the United States are applicable to State laws through the 14th amendment of the Constitution of the United States. They specifically tell you that. Now, I realize under State law that State law says try him. I've found nothing, I found a couple of cases but I didn't bring the citations with me, who almost, not on murder cases, but on other cases, almost say the same thing, but I must frankly admit to the Court that under State laws it says try him for murder the second time, but I would like to be the one to try to change that rule if I could. I think would be a distinction. Now, we say that to try him at this term of the Court, this October 1967 term of Court, when he was tried at the October 1962 term of the Court and was, in effect, acquitted of murder, that to again try him for murder for the same offense, upon the same indictment, would be a violation of this Constitution, of his

constitutional rights and for that reason we ask the Court to quash the indictment.

THE COURT: Do you want to say anything Mr. Anderson, for the record?

STENOGRAPHER'S NOTE: The witness Parker Ford was excused as a witness.

MR. ANDERSON: If the Court please, our Georgia Courts have not yet held that we should reindict a person [fol. 24] having been convicted for an offense, for a lesser offense than that in the indictment, and a retrial is demanded, our Georgia Courts say you can still try them on the old indictment and for the same charge as originally indicted for. Now, what the Federal courts will do with it, I don't know.

MR. WALLACE: If Your Honor pleases, if I may refresh, if I may respectfully interrupt Mr. Anderson, I don't think our, I don't think we've reached that point yet about trying them under the same indictment. I've got some law on that. I think the issue, if I may call your attention to, as to whether or not it's a violation of his constitutional rights the 5th amendment constitutional rights, in attempting to comment on murder, regardless of whether or not the charge is for a lesser offense under the present indictment of murder.

MR. ANDERSON: Our Georgia courts have held that we try him and I know of no law which says that I must reindict.

THE COURT: In view of the law which Mr. Wallace has cited, do you still elect to try him for murder rather than voluntary manslaughter?

MR. ANDERSON: Well, I couldn't try him for anything less because he's indicted for murder, and I can't try him for anything less than what he's indicted for.

MR. WALLACE: Well, now, since Mr. Anderson has injected that in it, I'd like to call this to Your Honor's attention, it's an old case, 2 Georgia Appeals, 283 page [fol. 25] 285. An indictment cannot be amended except by grand jury before arraignment.

THE COURT: I'll overrule your motion, Mr. Wallace.

MR. WALLACE: All right, sir, and I respectfully, Mrs. Johnson, for the record, except to the Court's ruling.

THE COURT: Before we bring the jury back, let me ask you another question.

STENOGRAPHER: Do you want this in the record?

THE COURT: Yes, put this in the record, it's with reference to the same case. Have you checked the grand jurors who were named in the old indictment against the jury that we have here?

MR. WALLACE: Yes, sir, there's about three on the grand jury and about three on the trial jury. I have them marked and I'd appreciate it if Your Honor would—

THE COURT: —what I'm trying to do is ascertain if we can start the trial of this case at nine o'clock in the morning rather than try it this afternoon.

MR. WALLACE: I think it would be all right.

THE COURT: I don't think we'll be able to try it this afternoon and get through with it at a reason—about hour tonight, and I'm not much on holding Court at night and I don't have any place to put these jurors to spend the night. What I would like to do though is get rid of these jurors who are * * *

DEFENDANT'S EXHIBIT No. 1

STATE OF GEORGIA, EFFINGHAM COUNTY
IN THE SUPERIOR COURT OF SAID COUNTY

INDICTMENT—Murder

The Grand Jurors, selected, chosen and sworn for the County of Effingham to-wit

1 Robert E. Graham Foreman
2 Calvin L. Seckinger
3 J. W. Exley, Sr.
4 Rupert L. Seckinger
5 Arnett A. Graham
6 J. F. Edwards, Jr.
7 Charlie Toshack
8 James Zittrouer
9 Lou Dean Hinely, Sr.
10 John Henry Zipperer
11 N. M. Arnsdorff
12 H. H. Reiser
13 Howard E. Wilson
14 Russell Pittman
15 Woodrow W. Oglesby
16 Waring D. Exley
17 C. M. Weaver
18 L. L. Durrance
19 Alton W. Exley
20 Burley L. Conaway
21 Perry M. Seckinger
22 C. A. Jerald
23 _____

In the name and behalf of the citizens of Georgia, charge and accuse Earl Price of the County and State aforesaid with the offense of

MURDER

for that the said Earl Price on 18th day of August, in the year of our Lord Nineteen Hundred and Sixty-Two, in the County and State aforesaid, did then and there, unlawfully, and with force and arms, make an assault in and upon one Johnnie Mae Dupree in the peace of God and said State then and there being, then and there unlawfully, feloniously, wilfully and of his malice aforethought, did kill and murder by cutting and stabbing the said Johnnie Mae Dupree with a certain knife which the said Earl Price then and there held, and giving to the said Johnnie Mae Dupree then and there a mortal

wound, of which mortal wound the said Johnnie Mae Dupree died.

And so the Jurors aforesaid, upon their oath aforesaid, do say that the said Earl Price the said Johnnie Mae Dupree in manner and form aforesaid, unlawfully, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the laws of said State, the good order, peace and dignity thereof.

Effingham Superior Court
October Term, 1962

H. B. LINDSEY
Prosecutor
Special Presentment

COHEN ANDERSON
Solicitor-General

2/320
2/369

EFFINGHAM SUPERIOR COURT
OCTOBER TERM, 1962

No. 684

THE STATE

vs.

EARL PRICE

MURDER

TRUE BILL

R. E. GRAHAM, Foreman
H. B. LINDSEY, Prosecutor

COHEN ANDERSON
Solicitor-General

The defendant being formally arraigned pleads not guilty, 10/19/67.

/s/ Allyn M. Wallace
Defendant's Attorney.

WITNESSES FOR THE STATE

Pauline Wilkerson
Guessman Johnson
Ethel Lee Johnson
Willie Bailey
Betty Ann Dupree
Dr. Sowell
H. B. Lindsey
Frank Rahn

The Defendant, _____ waives copy of Indictment and list of witnesses; also waives being formally arraigned and pleads not guilty.

COHEN ANDERSON
Solicitor-General

ALLYN M. WALLACE
Defendant's Attorney.

Oct. 17, 1962

We, the Jury find the defendant Earl Price guilty of Voluntary Manslaughter and fix the penalty at a minimum of ten (10) years and a maximum of fifteen (15) years.

This 17th day of October 1962.

SAM F. JONES, Foreman

CHARGE OF THE COURT (EXCERPT)

Gentlemen, in all criminal trials the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case.

The particular charge in this bill of indictment is that of murder. I charge you that murder is the unlawful killing of a human being in the peace of the State by a person of sound memory and discretion with malice aforethought either express or implied.

Malice, as referred to by the Court, and as defined by law, simply means that unlawful intention to take away the life of a fellow creature under circumstances where the law neither justifies, mitigates or excuses.

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof.

Malice shall be implied where no considerable provocation appears, and where all of the circumstances of the killing show an abandoned and a malignant heart.

If you believe that the defendant on trial killed the person named in the indictment in the manner therein charged * * *

IN THE SUPREME COURT OF GEORGIA

Case Number 24,570

EARL PRICE, APPELLANT

vs.

STATE OF GEORGIA, APPELLEE

ENUMERATION OF ERRORS—Filed March 12, 1968

AND NOW COMES the Appellant and files this his enumeration of errors which he alleges the Court committed and shows:—

1—That the Court erred in overruling the Defendants Special Plea of Autrefois Acquit, heard and disposed of in the Court prior to the arraignment and before pleadings to the merits and before the selection of the Jury.

2—That the Court erred in denying the Defendant his Constitutional rights as guaranteed under the Fifth and Fourteenth Amendments of the Constitution of the United States, in that he was tried for murder twice under the same indictment, the Defendant having been acquitted at the first trial for murder when he was found guilty of voluntary manslaughter by the Jury, being placed in jeopardy of life and liberty more than once for the same offense.

3—That the verdict is contrary to the evidence and without evidence to support it.

4—That the verdict is decidedly and strongly against the weight of evidence.

5—That the verdict is contrary to the law and principles of justice and equity.

6—That the Court erred in charging the Jury on voluntary manslaughter and in instructing the Jury that they may convict the Defendant of that offense.

7—That the Court erred in admitting the testimony of the Sheriff of Effiingham County, Georgia, concerning his opinion as to how the homicide was committed.

8—That the Court erred in denying Appellant who is an indigent, a copy of the transcript of the record and in

cancelling its order of November 11th, 1967, the Court having previously entered an order on the 11th day of November, 1967 ordering the official Court Stenographer to furnish Appellant's attorney a full and complete transcript of the record.

The reason that said case is being filed in the Supreme Court of Georgia is because there is a Constitutional question involved in the case, the Supreme Court of Georgia in such cases being vested with exclusive jurisdiction.

Respectfully submitted,

/s/ ALLYN M. WALLACE
Attorney for Appellant

[Certificate of Service Omitted in Printing]

IN THE SUPREME COURT OF GEORGIA

Case # 24,570

EARL PRICE, APPELLANT

vs.

STATE OF GEORGIA, APPELLEE

ENUMERATION OF ERRORS

ORIGINAL

Filed in Office, March 12, 1968

/s/ Henry H. Cobb,
C.S.C. Ga.

ALLYN M. WALLACE
Attorney at Law
Savannah, Ga.

43747

COURT OF APPEALS OF GEORGIA

Filed in Office, May 7, 1968

/s/ Morgan Thomas
Clerk Court of Appeals of Georgia

SUPREME COURT OF GEORGIA

Case No. 24879

Filed in Office

/s/ Henry H. Cobb
C.S.C. Ga.

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

43747
J-58

PRICE

v.

THE STATE

OPINION—June 25, 1968

JORDAN, P.J., PANNELL and DEEN, JJ.

JORDAN, Presiding Judge. Earl Price was indicted for the murder of Johnnie Mae Dupree, convicted of voluntary manslaughter and sentenced to 10 to 15 years. On appeal to this court (Price v. State, 108 Ga. App. 581 (133 SE2d 916)) we reversed on an erroneous charge of mutual combat. Price was again placed on trial for murder under the same indictment, resulting in his conviction of voluntary manslaughter and a sentence of 10 years. From such verdict and judgment, Price appealed to the Supreme Court of Georgia. The case was transferred to this court since "only questions as to the application of plain and unambiguous provisions of the Constitution" were involved. Price v. State, 224 Ga. 306 (SE2d). Held:

1. Enumerations of error 1 and 2 complain of the overruling of defendant's special plea of autrefois acquit and the denial of his rights under the 5th and 14th amendments to the Constitution of the United States in that he was placed in jeopardy of life and liberty more than once for the same offense. These contentions have been decided adversely to the defendant in the case of Brantley v. State, 132 Ga. 573 (64 SE 676), affirmed in 217 US 284 (54 LE 768), where it was said, "When a person has been indicted for murder and convicted of voluntary manslaughter, if he voluntarily seeks and obtains a new trial, he is subject to another trial generally for the offense charged in the indictment, and upon such trial he cannot

successfully interpose a plea of former acquittal of the crime of murder, or former jeopardy in regard thereto."

2. Enumerations of Error 3, 4 and 5 relate to the general grounds and enumeration number 6 to the charge of the court on voluntary manslaughter. These contentions were fully dealt with in Price v. State, 108 Ga. App. 581, division 5 (133 SE2d 916) and the result reached there is controlling on these issues since the evidence on the second trial was substantially the same as on the first trial.

3. Enumeration of error number 7 complains that portions of the testimony of the sheriff constituted conclusions and opinions as to how the homicide was committed. Since no objections were made to this testimony during the trial, this enumeration is without merit.

4. Enumeration of error number 8 contends that the court erred in denying the indigent defendant's request for a copy of the transcript of the record. Upon the filing of the defendant's notice of appeal in this case, a transcript of the record was filed with the trial court and transmitted to this court as provided by Code Ann. § 6-805(e) without cost to the defendant. This transcript was available to defendant's attorney for use in preparing his brief and in perfecting the appeal to this court, thus affording the defendant a full and adequate review without regard to his ability to pay. This situation is not within the ambit of such cases as Griffin v. Illinois, 351 US 12 (100 LE 891) and Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (2 LE 1269) relied upon by the defendant.

Judgment affirmed. Pannell ad Deen, JJ., concur.

A

ON MOTION FOR REHEARING—July 24, 1969

The defendant vigorously insists that the 1909 decision in Brantley v. State, 132 Ga. 573 (64 SE 676), affirmed in 1910 by the United States Supreme Court in 217 US 284 (54 LE 768), is no longer controlling as the law of this State, in view of the 1957 decision of the United States Supreme Court in Green v. United States, 355 US 184 (2 LE2d 199; 78 SC 221, 61 ALR2d 1119) and the 1965 decision of the United States Court of Appeals, Second Circuit, in United States v. Wilkins, 348 F2d 844.

In the Green case the Supreme Court determined that a defendant charged with first degree murder in the District of Columbia and convicted of second degree murder, who obtained a new trial and was convicted on the second trial of first degree murder, was placed in jeopardy twice for the same offense in violation of the Fifth Amendment of the Constitution. In a footnote (2 LE2d 208, n. 15) the court distinguished the Brantley case because it involved a trial in a state court.

In the Wilkins case, the petitioner in habeas corpus was indicted under New York law of first degree murder, and tried three times. After successfully appealing in the New York courts his first conviction of second degree murder, and a second conviction of first degree murder, he was convicted on the third trial of second degree murder, and imprisoned under a sentence of 40 years to life. The Court of Appeals for the Second Circuit held that the State of New York transgressed the limitations of the Fourteenth Amendment in prosecuting the petition for first degree murder following the completion of the first trial, and that a reasonable possibility of prejudice existed in the third trial by the fact that he was prosecuted for first degree murder. The court ordered that the writ be granted unless within a reasonable time New York afforded the petitioner a new trial conforming to the principles set forth in the opinion. Although the United States Supreme Court denied certiorari, 338 US 913 (15 LE2d 667; 86 SC 396) this does not establish a controlling precedent of the Supreme Court on the merits.

In 1966 the Supreme Court, in Cichos v. Indiana, 385

US 76 (17 LE2d 175; 87 SC 271), rehearing denied, 385 US 1020 (17 LE2d 559; 87 SC 699) did have before it the precise question of whether the Fifth Amendment's prohibition against double jeopardy applied to a state court prosecution under the due process provisions of the Fourteenth Amendment. Instead of determining the issue, however, the court dismissed the writ of improvidently granted, taking the view that because of the indistinguishable features under Indiana law of the two offenses charged, reckless homicide and involuntary manslaughter, there being a conviction in both the first and second trials only of reckless homicide, it could not accept the petitioner's assertions that the first jury acquitted him of involuntary manslaughter and that the second trial placed him twice in jeopardy.

Earlier, in 1959, the United States Supreme Court held that the due process clause of the Fourteenth Amendment does not bar successive federal and state prosecutions for a single criminal act violating state and federal law. Bartkus v. Illinois, 359 US 121 (3 LE2d 684; 79 SC 676), rehearing denied, 360 US 907 (3 LE2d 1258, 79 SC 1283).

While the dissenting opinion of Mr. Justice Black in Bartkus (3 LE2d 705) which he adhered to while concurring in the majority opinion in Cichos, and the dissenting opinion of Mr. Justice Fortas in Cichos (3 LE2d 179) express views that may eventually become the majority opinion of the court, consonant with other opinions of the court subsequent to Bartkus with respect to due process in state court prosecutions (see Annotation, Bill of Rights in State Courts, 18 LE2d 1388, particularly §§ 2, 3, and 7[c], in which the cases are collected and discussed) the Brantley case as decided by the Georgia Supreme Court and affirmed by the United States Supreme Court, has never been expressly overruled.

Under the mandate of Article VI, § II, paragraph IV of the Georgia Constitution (Code § 2-3708) the Georgia Supreme Court and not this court has jurisdiction of a case involving the construction of the United States Constitution, and under paragraph VIII (Code § 2-3708) the decisions of the Georgia Supreme Court are binding

on this court as precedents. The Georgia Supreme Court, in line with numerous other decisions, transferred the case to this court as involving *only* the application of plain and unambiguous provisions of the United States Constitution. Price v. State, 224 Ga. 306 (SE2d). Within these limitations this court must apply the Brantley case as the controlling precedent. Accordingly, the court adheres to its original opinion.

Motion denied. Pannell and Deen, JJ., concur.

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta

43747

EARL PRICE

v.

THE STATE

JUDGMENT—June 25, 1968

This case came before this court on appeal from the Superior Court of Effingham County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Jordan, P. J., Pannell and Deen, JJ., concur.

IN THE COURT OF APPEALS OF GEORGIA

Case Number 43747

Decided June 25, 1968

EARL PRICE, PLAINTIFF IN ERROR

vs.

THE STATE OF GEORGIA, DEFENDANT IN ERROR

MOTION FOR REHEARING—Filed July 2, 1968

Comes now EARL PRICE, Plaintiff in Error in the above stated case, and within the time allowed by law, files this his Motion for a Rehearing in the above styled case, and for grounds thereof says:—

1—The Court erred and overlooked a material decision, holding in this case, that "when a person has been indicted for Murder and convicted of Voluntary Manslaughter, if he voluntarily seeks and obtains a new trial, he is subject to another trial generally for the offense charged in the indictment, and upon such trial he cannot successfully interpose a plea of former acquital of the crime of murder, or former jeopardy in regard thereto," citing as authority the case of Brantley VS. the State, 132 Ga. 573 Affirmed in 217 U.S. 284, 54 L.Ed. 768.

Plaintiff in Error contends that the Brantley Case (132 Ga. 573) is not the law in the case before the Court. This rule of law, old as it is, has been set aside by recent rulings of the Federal Appellate Courts, all of which are applicable to State Courts. What was regarded as fair in one epoch of our history as a nation may be regarded as fundamentally unfair in the next. In applying fundamental fairness, Courts are required to re-evaluate prior interpretations of the due process clause of the Constitution in light of changing concepts as to minimum standards of fairness. The Brantley Case relied upon by this Honorable Court was in the year, 1910. This is the year of 1968, a time or period when the Appellate Courts are more concerned with the constitutionally protected human

rights than they were back in the year, 1910. The Brantley Case arose during what might be called a period or lull in the Courts concern of guaranteed Constitutional rights. This is a new day with new ideas, new rulings and drastic changes in old adequated laws which in substance denied citizens of their guaranteed Constitutional rights.

In the case of United States of America vs. Wilkins, reported in 348 Fed. Rep. 2d Series 844 the United States Court of Appeals, Second Circuit, held in a New York State Murder Case, that where a Defendant was convicted of second-degree murder and the conviction was reversed in the State Court, the State was *forbidden* by the Constitution from prosecuting the Defendant again for first-degree murder in the same case or crime. The mere fact that a reversal of the first trial in the present case before this Honorable Court came about and was successfully appealed by the accused, *he did not waive* his Constitutional defense of former jeopardy to a second prosecution on the first-degree murder charge. It is not a bar. This principal of law is very plainly set out in the case of United States vs. Wilkins reported in 348 Fed. Rep. 2d Series 844, and also in the case of Green vs. United States a Supreme Court of the United States decision decided December 16th, 1957, 355 U.S. 184, 2 L. Ed. 2d 199, some 47 years after the Georgia Brantley Case.

In the case of United States vs. Wilkins, 348 Fed. Rep. 2d Series, as referred to above, the Court said on pages 862 and 863 (10 and 11),

> "Thirdly, and perhaps most significantly, the authority of Brantley and the Kring dictum (even if the latter be read to reach the instant double jeopardy claim) has been tarnished by the gradual but certain evolution of our constitutional understanding of justice and fairness. Mr. Justice Frankfurter, the most eloquent and ardent contemporary advocate of the fundamental fairness standard, consistently maintained that in applying this standard the courts are permitted, *nay are required*, to re-evaluate prior interpretations of the Due Process Clause in light of

"changing concepts as to minimum standards of fairness," Green vs. United States, supra, 355 U.S. at 215, 78 S.Ct. at 238 (dissenting opinion); see also, e. g. Malinski v. New York, 324 U.S. 401, 414, 65 S.Ct. 781, 89 L. Ed. 1029 (1945) (concurring opinion); Louisiana ex rel. Francis v. Resweber, supra, 329 U.S. at 466-467, 67 S.Ct. 377-378; Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L. Ed. 183 (1952); and with this view there could be little dispute. What was regarded as fair in one epoch of our history as a nation may be regarded as fundamentally unfair in the next, even though the judgment is "not ad hoc and episodic but duly mindful of reconciling the needs of continuity and of change in progressive society," id. at 172, 72 S.Ct. at 209. Kring (1882) and Brantley (1910) reached the Supreme Court at a time when the precepts of justice emanating from the Due Process Clause of the Fourteenth Amendment were rudimentary and insensitive to outrageous imperfections in the state criminal processes. To mention but two examples, it was not until the 1930's that a state conviction was invalidated under the Due Process Clause because it rested solely "upon confessions shown to have been extorted by officers of the state by brutality and violence," Brown v. State of Mississippi, 297 U.S. 278, 279, 56 S.Ct. 461, 462, 80 L. Ed. 682 (1936), or because an accused in a capital case was denied the effective assistance of counsel, Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932); and it would be naive to suppose that in the seventy year period between the adoption of the Fourteenth Amendment and these decisions, no such defects existed or were complained of. Kring and Brantley arose during this lull in the Supreme Court's concern for constitutionally protected human rights, and even if Kring and Brantley be read as declaring that this type of reprosecution is not so fundamentally unfair as to amount to a denial of due process of law, we would decline to follow them in applying the fundamental fairness standard, not merely be-

cause of their half century antiquity, but because we would not be faithful to the evolution of our societal values if we reached any other conclusion.

(11) New York was constitutionally forbidden to reprosecute Hetenyi for first degree murder following the completion of the first trial and to the extent that sections 464 and 544 of the N. Y. Code of Criminal Procedure authorize such a reprosecution, they are inconsistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution."

In the case of Green vs. United States reported in 355 US 184, 2 L ed 2d 199, pages 206 and 207 of Lawyer's edition (2 L ed 2d), the Court said:—

"Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. But the result in this case need not rest alone (355 US 191) on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. Wade v Hunter, 336 U.S. 684, 93 L ed 974, 69 S Ct 834. In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read:

"We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree."

After the original trial, but prior to his appeal, it is indisputable that Green could not have been tried again for first degree murder for the death resulting from the fire. A plea of former jeopardy would have absolutely barred a new prosecution even though it might have been convincingly demonstrated that the jury erred in failing to convict him of that offense. And even after appealing the conviction of second degree murder he still could not have been tried a second time for first degree murder had his appeal been unsuccessful.

Nevertheless the Government contends that Green "waived" his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a successful appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. "Waiver" is a vague term used for a great variety of purposes, good and bad, in the law, in any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. Cf. Johnson v Zerbst, 304 US 458, 82 L ed 1461, 58 S Ct 1019, 146 ALR 357. When a man has been convicted (355 US 192) of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses" to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice. And as Mr. Justice Holmes observed, with regard to this same matter in Kepner v United States, 195 US 100, 797, 1 Ann Cas 655: "Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

In view of what the Supreme Court of the United States has held as well as the Second Circuit Court of Appeals of the United States, it would appear beyond a shadow of a doubt that the Defendant in the present case before this Honorable Court was deprived of his constitutional rights when the Trial Court tried him for murder the second time in the same case, when in fact he had been found guilty of Voluntary Manslaughter in the first trial. The jury in effect at the first trial found him not guilty of murder. In the Green Case page 206 of 2 L ed 2d, the Court said:— "In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which read:— "The jury finds, the Defendant not guilty of murder in the first degree but guilty of murder in the second degree."

These cases further hold that these rulings apply to all citizens of the United States under the Due Process Clause of the Fourteenth (14th) Amendment of the Constitution of the United States, and that they are applicable to State Courts. Neither of these two cases cited go along with the Brantley Case. In fact, both cases cited hold a Defendant who, on a charge of first degree murder, was convicted of second degree murder *does not waive* his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a successful appeal of his improper conviction of second degree murder.

These two cases cited in effect reverse the Georgia Brantley Case wherein it was held in substance that the Defendant in this case now before the Court, could not successfully interpose a plea of former acquital simply because he had successfully obtained a reversal of an improper conviction of Voluntary Manslaughter.

In view of these two Federal decisions Plaintiff in Error cannot rest his case on the out-dated decision of the Georgia Brantley Case. The decision in this case is out of line with present day trends of the Federal Appellate Courts and this old 1910 decision should be reversed so that Georgia Law might be in step with present day trends.

Plaintiff in Error urgently requests the Court to carefully read and consider these two Federal Cases cited and that the Court give consideration to this motion for Rehearing, because Plaintiff in Error is of the opinion that the Court has overlooked these two major material decisions in deciding this case. It is Plaintiff in Error's firm belief that The Supreme Court decisions are the Law of the land and that they supersede all other decisions of other Appellate Courts on a given question of law and while it might be said that the decision in the Brantley case of the year, 1910, is the Law of Georgia in such cases, the question is whether not this decision should be set aside in view of the Federal Court rulings, all of which are right in point and certainly applicable to the case now before this Honorable Court. The Federal cases cited in the original brief of Plaintiff in Error and again cited in this request of a Rehearing, hold conclusively and they cannot be otherwise interperted, that the Defendant in Error in this case now before the Court should not have been tried for murder for the same offense the second time in view of the verdict of the first trial even though the Defendant Voluntarily sought and obtained a reversal of his first improper conviction of Voluntary Manslaughter. The fact that the Defendant in Error was tried the second time for murder it can conclusively be said that it gave the prosecution the advantage of offering the jury a choice, a situation which is apt to induce a doubtful jury to find the Defendant guilty rather than to continue debate as to his innocence.

The Court is earnestly urged to set aside it's previous decision in this case and hold that in view of the recent Federal decisions the ruling in the Brantley case is out of line with present day decisions and trends of the Supreme Court of the United States. It is conceded that the Court of Appeals is generally bound by the decisions of the Supreme Court of Georgia until changed, set aside or modified by that Court and that most likely the Court of Appeals has no right to set the Brantley case aside but the position of Plaintiff in Error is that these recent Federal decisions have set this opinion of the Supreme Court of Georgia aside and that it is now merely an

application of the law of the Federal Courts which it is felt this Honorable Court has a right to do, most especially in view of what the Federal Courts have said on this point of law. The decision in the Brantley case is wrong, out of date and not in line with the Supreme Law of the land. It cannot stand and should not stand as the Law of Georgia.

In conclusion, the Court's attention is again directed to Head Note 10 of the Green case and the Courts comments under this Head Note wherein the Court held:— "a Defendant who, on a charge of first degree murder, was convicted of second degree murder, *does not* waive his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a successful appeal of his improper conviction of second degree murder." Is not this decision in the Green case directly opposite to the decision in the Georgia Brantley case? The other case cited and reported in 348 Fed. Rep. 2d Series 844, holds the same as in the Green case, when the Court in Head Note 20 said:— "Prosecution for first-degree murder and submission to jury of first-degree murder charge violated accused's constitutional rights not to be prosecuted for first-degree murder following completion of first trial at which he had been convicted of second-degree murder for same crime." The Court in this case referred to the Georgia Brantley case and said further that they would decline to follow the Brantley case decision in applying the fundamental fairness standard, not merely because of their half century antiquity, but because they would not be faithful to the evolution of our societal values if we reached any other conclusion.

The Court of Appeals of Georgia under Code Section 2-3708 of the Code of Georgia, is bound by the decisions of the Supreme Court of Georgia and they must follow the decisions of that Court where the issue is clearly settled by decisions of that Court. In the case now before this Honorable Court, the Court has followed the decision of the Supreme Court of Georgia in citing the Brantley case in 132 Ga. 573 on the question of former jeopardy. It is apparent that this Honorable Court had no other alternative but to do what it did on the issue raised in

this Rehearing request and as set out in Enumerations of Errors One (1) and Two (2) of the case. If this be true, then in all fairness to Plaintiff in Error and most especially in view of the recent decisions of the Federal Courts on this question which is set out in this Rehearing Request, it would appear that this matter should be submitted to the Supreme Court of Georgia, who made the law for further study and consideration of its position in the year, 1910. This case is out-dated and not in line with The Supreme Law of the land, and Plaintiff in Error most respectfully and urgently requests this Honorable Court to give serious consideration to this Motion for a Rehearing, vacating its previous ruling in the case on the question of former jeopardy and submit the matter to The Supreme Court of Georgia for direction. It is felt that this question of law involves great public concern and of matters of gravity and importance to such an extent in view of the Federal Decisions set out, that The Supreme Court of Georgia should be called upon for a further look of its decision in the Brantley case.

Respectfully submitted,

/s/ Allyn M. Wallace
Attorney for Plaintiff in Error

CERTIFICATE OF COUNSEL

I, ALLYN M. WALLACE, Attorney of Record, for EARL PRICE, Plaintiff in Error in Case Number 43,747, Court of Appeals of Georgia, do certify that upon careful examination of the Opinion of the Court, I have every belief that the facts stated and evidence quoted and the law referred to in the attached Motion for Rehearing have been overlooked by the Court, all of which are material and if considered would require a different Judgment from that rendered by the Court.

I also certify that a copy of the within and foregoing Motion for Rehearing has been served upon the Attorney General of Georgia, the Honorable Arthur K. Bolton; the Solicitor General of the Ogeechee Circuit, the Honorable Cohen Anderson; and the Honorable George W. Fetzer of Springfield, Georgia.

Certified to this 1st day of July, 1968.

/s/ Allyn M. Wallace
ALLYN M. WALLACE
Attorney for Plaintiff in Error

P. O. Box 43
Savannah, Georgia

[File Endorsement Omitted in Printing]

IN THE COURT OF APPEALS
OF GEORGIA

Case No. 24879

Supreme Court of Georgia
Filed in office, Henry H. Cobb, C-S-C Ga.

EARL PRICE, APPELLANT

vs.

STATE OF GEORGIA, APPELLEE

MOTION FOR REHEARING

ALLYN M. WALLACE
Attorney at Law
Savannah, Ga.

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

43747

EARL PRICE

v.

THE STATE

ORDER DENYING MOTION FOR REHEARING—July 24, 1968

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

IN THE COURT OF APPEALS OF GEORGIA

No. 43,747

EARL PRICE, PLAINTIFF-IN-ERROR.

vs.

THE STATE OF GEORGIA, DEFENDANT-IN-ERROR.

NOTICE OF INTENTION TO APPLY FOR WRIT OF CERTIORARI TO SUPREME COURT OF GEORGIA.—filed July 29, 1968

TO THE CLERK OF THE COURT OF APPEALS OF GEORGIA.

You are hereby notified that it is the intention of EARL PRICE, Plaintiff-in-Error, to apply to The Supreme Court of Georgia for the Writ of Certiorari to review the Judgment of the Court of Appeals rendered and filed in the above stated case on June 25th, 1968, in which case a Motion for Rehearing was denied on July 24th, 1968. The following portions of the record are hereby ordered.

1—Notice of Appeal filed in Effingham County Superior Court. (Page 1 of record as prepared by Clerk of lower Court.)

2—Special Plea of Autrefois Acquit (Pages 2 thru 6 of record as prepared by Clerk of lower Court.) which includes Grand Jury Indictment of Earl Price for Murder at the *1962* Term of Effingham County Superior Court which is Pages 5 and 6 of the record as prepared by the Clerk of the lower Court.

3—Bill of Indictment for Murder from Effingham County Superior Court *1962* Term and all notations thereon. (Pages 5 and 6 of the record as prepared by Clerk of lower Court.)

4—Order of Court dated October 19th, 1967, overruling the special Plea of Autrefoir Acquit. (Page 7 of the record as prepared by Clerk of lower Court.)

5—Verdict of Jury dated October 17th, 1962, finding Plaintiff-in-Error guilty of Voluntary Manslaughter fixing his punishment at 10 years minimum and 15 years maximum. (Page 6 of the record as prepared by Clerk of lower Court.)

6—Plea of Not Guilty, dated October 19th, 1967, entered by Plaintiff-in-Error. (Page 8 of the record as prepared by Clerk of lower Court.)

7—Verdict of Jury dated October 20th, 1967, finding Plaintiff-in-Error guilty of Voluntary Manslaughter fixing his punishment at 10 years. (Page 9 of the record as prepared by Clerk of the lower Court.)

8—Sentence of Effingham County Superior Court at the October, *1967* Term. (Page 10 of the record as prepared by the Clerk of the lower Court.)

9—Motion of Plaintiff-in-Error made in Effingham County Superior Court. (Pages 3 thru 7 of the transcript of the trial proceedings.)

10—Evidence of Honorable A. Parker Ford, Clerk of Effingham County Superior Court. (Pages 8 thru 25 of the transcript of the trial proceedings.)

11—Indictment of the Grand Jury of Effingham County Superior Court, at the October, *1962* Term of the Court charging Plaintiff-in-Error with the offense of murder and marked "Defendant's Exhibit No. 1." (Page 29 of the transcript of the trial proceedings.)

12—A portion of the charge of the Honorable Walton Usher, Judge of Effingham County Superior Court, on murder to the trial jury. (Page 223 of the transcript of the trial proceedings.)

13—Enumeration of Errors filed in the case.

14—Opinion of the Court of Appeals of Georgia date June 25th, 1968, case number 43,747.

15—Opinion of the Court of Appeals of Georgia on Motion for Rehearing dated July 24th, 1968, case number 43,747.

16—Motion for Rehearing filed in the Court of Appeals of Georgia, July 2nd, 1968.

17—Written notice to the Honorable Morgan Thomas, Clerk of the Court of Appeals of Georgia of intention to apply to The Supreme Court of Georgia for a Writ of Certiorari.

ALLYN M. WALLACE
Attorney for Plaintiff-in-Error, Earl Price

[Certificate of Service Omitted in Printing]

[File Endorsement Omitted in Printing]

Case No. 43,747

IN THE COURT OF APPEALS OF GEORGIA.

Case No. 24879

Supreme Court of Georgia
Filed in office, Henry H. Cobb, C-S-C Ga.

EARL PRICE, PLAINTIFF IN ERROR.

vs.

THE STATE OF GEORGIA, DEFENDANT IN ERROR.

NOTICE OF INTENTION TO APPLY TO THE SUPREME COURT OF GEORGIA FOR THE WRIT OF CERTIORARI.

ALLYN M. WALLACE
Attorney at Law
Savannah, Ga.

IN THE SUPREME COURT OF GEORGIA

Atlanta

24879

EARL PRICE

v.

THE STATE.

ORDER DENYING CERTIORARI—September 24, 1968

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

Bill of Costs, $15.00

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA —Oct. 7, 1968

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Allyn M. Wallace paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Henry H. Cobb, Clerk.

Case No. 43747
Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office Oct. 7, 1968)

/s/ Morgan Thomas
Clerk Court of Appeals of
Georgia.

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

43747

EARL PRICE

v.

THE STATE

ORDER STAYING REMITTITUR—September 30, 1968

It is ordered that the remittitur in this case be stayed pending application to the Supreme Court of the United States for the writ of certiorari.

* * * *

[Clerk's Certificate to Foregoing Transcript Omitted in Printing.]

* * * *

IN THE SUPREME COURT OF GEORGIA

No. 24879

Supreme Court of Georgia

No. 43,747

Court of Appeals of Georgia

EARL PRICE, APPLICANT FOR CERTIORARI.

vs.

THE STATE OF GEORGIA, RESPONDENT IN CERTIORARI.

APPLICATION FOR CERTIORARI—filed August 22, 1968

TO THE SUPREME COURT OF GEORGIA.

Now comes EARL PRICE and files this his application for a writ of certiorari in the above styled cause and for grounds thereof says:—

I.

The decision and judgment of The Court of Appeals of Georgia in the case of Earl Price, Plaintiff-in-Error, vs. The State of Georgia, Defendant-in-Error, being numbered, 43,747 in said Court, was rendered and filed on June 25th, 1968, affirming the Trial Court. The case was heard by the Third Division of said Court and its decision was unanimous.

II.

This decision and judgment was adverse to your Petitioner and Applicant, and within ten days of its rendition, Applicant, Earl Price filed his motion for rehearing in said matter, which was denied on July 24th, 1968.

III.

On July 26th, 1968, Applicant gave notice to the Clerk of The Court of Appeals of his intention to apply to The

Supreme Court of Georgia for a writ of certiorari in said cause, which notice was in writing as required by Law.

IV.

This application for said writ of certiorari is being filed with the Clerk of this Court within thirty days from the date of the final order of the Court of Appeals of Georgia on the motion for rehearing filed by Applicant in said case.

V.

Petitioner files with this application a certified copy of that portion of the record in The Court of Appeals of Georgia which Petitioner feels is necessary for a final determination of this case including a copy of the decision and judgment sought to be reviewed and corrected.

FACTUAL STATEMENT

The applicant for certiorari was indicted and tried for murder at the October, *1962* Term of the Superior Court of Effingham County, Georgia. He was found guilty and convicted of voluntary manslaughter by a Jury, the Jury fixing the sentence at 10 to 15 years.

On appeal to The Court of Appeals of Georgia, (Price vs. The State of Georgia 108 GA. App. 581) the case was reversed on an erroneous charge of the Trial Court of mutual combat.

Applicant for certiorari, Earl Price was again placed on trial for murder under the same indictment at the October, *1967* Term of The Superior Court of Effingham County, Georgia resulting in his conviction by a jury of voluntary manslaughter and a sentence of 10 years.

From the second trial for murder under the same indictment, the verdict and judgement, Earl Price appealed to The Supreme Court of Georgia. (Price vs. The State of Georgia 224 GA. 306) The case was then transferred by The Supreme Court of Georgia to The Court of Appeals of Georgia upon the theory that the only questions as to the application of plain and unambiguous provisions of the Constitution being involved, and there being no other

basis of this Court's jurisdiction of the appeal, the case must therefore be transferred to The Court of Appeals of Georgia.

ASSIGNMENT OF ERROR

Error is assigned upon the decision of The Court of Appeals of Georgia with regard to Enumerations of Error 1 and 2 complaining of the overruling of a special plea of autrefois acquit filed by Plaintiff-in-Error in The Trial Court prior to arrainment the second time and the denial of his rights under the 5th and 14th Amendments to the Constitution of The United States, in that he was placed in jeopardy of life and liberty more than once for the same offense (murder), where at the first trial in the Trial Court, the Jury found him not guilty of murder but guilty of voluntary manslaughter, The Court of Appeals of Georgia holding that when a person has been indicted for murder and convicted of voluntary manslaughter if he voluntarily seeks and obtains a new trial, he is subject to another trial generally for the offense charged in the indictment, and upon such trial he cannot successfully interpose a plea of former acquital of the crime of murder, or former jeopardy in regard thereto. The Court of Appeals of Georgia cited as authority the case of Brantley vs. The State 132 GA. 573, a decision of the Supreme Court of Georgia rendered in the year, 1910.

Said Court of Appeals of Georgia erred in not holding and ruling that the special plea of autrefois acquit filed by your Petitioner was a bar to further prosecution of the offense of murder and in not holding that your Petitioner when tried for the offense of murder the second time under the same indictment when the first jury found him guilty of voluntary manslaughter (The equivalent of finding him not guilty of murder) was a violation of his Constitutional rights under the 5th and 14th Amendments to the Constitution of The United States.

Error is also assigned on the judgement of The Court of Appeals of Georgia on the motion for rehearing holding that they were bound by the decision in the Brantley case, when in fact that case was in substance overruled by The Supreme Court of the United States. The United States

Supreme Court has repeatedly held that the 5th and 14th Amendments of the United States Constitution are applicable to State Courts, this being the Supreme Law of the land. They are also bound by the provisions of the United States Constitution.

REASONS FOR GRANTING WRIT

The decision of The Court of Appeals of Georgia involves legal principles of general, vital and state-wide importance, gravity and grave concern; that the question as to whether or not the State of Georgia is forbidden by The Constitution of The United States from prosecuting one for murder the second time when a Defendant was found guilty of voluntary manslaughter at the first trial when a Defendant successfully obtained a reversal of his former trial on an improper charge of the Trial Court. Did he waive his Constitutional defense of former jeopardy to a second prosecution for murder, simply because he elected to seek and did seek a new trial, when in fact the jury at the first trial refused and did not find him guilty of murder. Did not the jury at the first trial acquit him of murder? If it did he should not be tried the second time for murder.

These are questions that should be answered and determined because there can be dreadful consequences to those who will be confronted with similar circumstances as your Petitioner with respect to their legal rights, and then to Petitioner feels that The Supreme Court of Georgia should take a further look at the Court's decision in the Brantley case (132 GA. 573) a case decided in the year, 1910, which is apparently the Law of Georgia, old as it is, most especially in view of the recent decisions of the Federal Courts on this one point of Law and in this period of history of our Nation when Courts are now more concerned with the Constitutionally protection of human rights than they were back in the year, 1910. The Brantley case arose during what might be called a period or lull in the Courts concern of guaranteed Constitutional rights. Petitioner says that this Honorable Court should review the decision of The Court of Appeals

of Georgia in this case as well as the decision in the Brantley case and correct a situation which is not in line with The Supreme Law of the land.

Currently with the filing of this application is filed a brief of authorities relied on together with a written argument.

WHEREFORE, Applicant prays that this Honorable Court grant this application for writ of certiorari and that the judgment and decision of The Court of Appeals of Georgia be reviewed and reversed and that the errors committed by it be considered and corrected and that the rule of Law set out in the Brantley case be set aside and declared invalid.

/s/ Allyn M. Wallace
Attorney for Earl Price,
Applicant for Writ of Certiorari

IN THE SUPREME COURT OF GEORGIA

No. ———

Supreme Court of Georgia

No. 43,747

Court of Appeals of Georgia

EARL PRICE, APPLICANT FOR CERTIORARI.

vs.

THE STATE OF GEORGIA, RESPONDENT IN CERTIORARI.

CERTIFICATE OF COUNSEL

I, ALLYN M. WALLACE, counsel of record for EARL PRICE, Applicant for the Certiorari do hereby certify that I verily believe that the foregoing case is one which is contemplated by the rules of The Supreme Court of Georgia pertaining to certiorari, that it does not fall within the case of those prohibited by the rules of this Court, and I do believe that the Writ of Certiorari should be granted under the rules in said case.

This 20 day of August, 1968.

/s/ Allyn M. Wallace
Counsel of record for Earl Price,
Applicant for Certiorari

[Statement of Counsel as to Poverty of Petitioner (Omitted in Printing)]

[Certificate of Service Omitted in Printing]

[File Endorsement Omitted in Printing]

IN THE SUPREME COURT OF GEORGIA

EARL PRICE

v.

THE STATE

The following judgment was rendered September 24, 1968.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

Bill of costs, $15.

[Clerk's Certificate to Foregoing Transcript Omitted in Printing.]

SUPREME COURT OF THE UNITED STATES

No. 1254 Misc., October Term, 1968

EARL PRICE, PETITIONER

v.

GEORGIA

On petition for writ of Certiorari to the Supreme Court of the State of Georgia.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 23, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1557, placed on the summary calendar and set for oral argument immediately following No. 515 Misc. In addition to the questions presented by the petition, counsel are requested to brief and argue the question of retroactivity of Benton v. Maryland, 395 U.S. —— (decided this date) and whether that decision is applicable to this case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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